U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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DATE: February 23, 2000
CASE NO.: 2000 - INA - 30

In the Matter of:
PUNJAB INDIAN RESTAURANT #3, INCORPORATED,
Employer,

on behalf of

PALWINDER SINGH,
Alien.

Appearance: Mr. Frank Murphy, Esq.
Miami, FL

Certifying Officer: Mr. Floyd Goodman
Atlanta, GA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Palwinder Singh ("Alien") filed by Employer Punjab Indian Restaurant #3, Incorporated ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, Atlanta, Georgia, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly

employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on November 17, 1999; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a grounds of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

On January 9, 1998, Employer Punjab Restaurant #3, Incorporated, applied for labor certification to allow it to fill the position of "Cook, Indian Specialty" in its Fort Lauderdale, Florida location. The position was described as:

> "Preparation of meals, planning menus, buying food, supervision of kitchen, for Indian restaurant." (AF 1)

After amendment of the application to comply with the Florida Department of Labor and Employment Security ("FDOLES") requests, the position listed a wage of $445.00 per week; the original offer had been below the Service Contract Act prevailing wage. The hours were 12:00 noon until 10:00 p.m. Friday through Monday. Four years of experience in the offered job were required; originally, five years had been requested. (AF 1, AF 24-30). Also accompanying the application was a menu from the restaurant. (AF 5-7).

Employer advertised in a newspaper and posted the opening as required by law, but no applications or referrals were received. (AF 10-19). The application was transmitted to the CO on August 11, 1999, without comment. (AF 8-9).

A Notice of Findings ("NOF") was issued on August 24, 1999 which proposed to deny the application based on a violation of § 656.21(b)(5), which states that the requirements for the job must be the minimum necessary to perform the job, and that Employer has not hired workers with less than the requirements, or that it is not feasible to hire workers with less than the requirements. Specifically, the CO found that the only experience listed for Alien was at Punjab Indian Restaurant #1, and therefore he found that the qualifying experience had come from Employer. "Please be advised that experience gained with the employer cannot be counted."

When this experience was not counted, Alien no longer met the four year experience requirement, and so was either not qualified for the job, or the requirements were not the actual minimum. As corrective action, the CO requested that Employer submit evidence regarding the ownership of Punjab Restaurant #1. (AF 37-38).

Employer submitted its Rebuttal on September 22, 1999. This consisted of the business licenses for both Punjab Indian Restaurant #1 and #3, and corporate tax returns for both. The purpose of the evidence was to show that the two restaurants were separate and distinct corporate entities, and therefore the experience of Alien at #1 should not be counted as being with the same employer. (AF 39-57).

The CO issued a Final Determination ("FD") on October 1, 1999. The FD denied certification for a violation of § 656.21(b)(5) because the CO found the Rebuttal did not show that the Alien had the required experience, or that the requirements were the minimal necessary. In fact, the CO found that the Rebuttal supported the NOF citation because they conclusively demonstrated that Mr. Ramjit Singh was the owner of both establishments, as he was listed on the licenses directly below the corporate name. (AF-58-59).

Employer filed a request for review on October 11, 1999 on the grounds that the NOF did not provide adequate notice of exactly what needed to be rebutted. Employer maintained that it was not informed that a relationship between the ownership and experience of both restaurants was the basis for the objection, and requested the opportunity on remand to submit evidence that the two establishments were in fact separate entities by virtue of operational and management independence. Additionally, Employer presented a business necessity argument, stating that because Punjab Restaurant #1and #2 were managed by Mr. Singh and his wife, respectively, Employer was required to hire a trained cook. No one else was available to train another worker at Punjab Restaurant #3. (AF 59(a)-60)[1].

Discussion

An NOF is intended to provide notice to an employer of the deficiencies in its application, and to offer an opportunity to correct those deficiencies and obtain labor certification. Downey Orthopedic Medical Group, 1987-INA-674 (March 16, 1988) (*en banc*); Carlos Uy III, 1997-INA-304 (March 3, 1999)(*en banc*). It is vital, therefore, that the NOF be clear, explicit, and informative. An employer must be able to discern from the NOF what corrective actions may or will be sufficient to correct the shortcomings of the initial application. That is not to say that an NOF must be a "roadmap" to certification. Miaofu Cao, 1994-INA-53 (March 14, 1996)(*en banc*).

The NOF in this case was adequately clear. It specified what regulation had been violated

[1]There are two pages numbered "59" in the AF. I have designated the second of these, the first page of the request for review, as "59(a)."

and gave very specific instructions on how to rebut that finding of deficiency. Employer argues it was misled into believing that merely showing the two restaurants had separate corporate identities was sufficient, and it was not warned that a mere relationship between the owners of the respective corporations would also merit denial of the application. This claim is undermined, however, by Employer's own statements in Rebuttal. The Rebuttal stresses legal separation of the two entities, and urges that "work experience at Punjab Restaurant I, Inc., should not be counted as experience with the same employer...." Clearly, Employer was aware that the CO was concerned that the two businesses shared common ownership.

Employer bears the burden in labor certification. 20 C.F.R. § 656.2(b). The rebuttal following the NOF is the last clear chance of the Employer to perfect a record which will meet that burden. Employer has failed to do so here, even though the Employer demonstrably knew the CO's concern. Employer desires a remand so that it may complete the record and submit further evidence to show that the businesses are separate in fact as well as by legal definition, but this is evidence that could have, and should have, been submitted with the Rebuttal. We will not remand the case when Employer clearly knew exactly what the deficiency was, but merely failed to submit all the relevant evidence at its disposal in rebuttal.

Employer additionally puts forth in its request for review a "business necessity" argumen, which is essentially an "infeasibility to train" argument. Employer maintains that because Mr. Ramjit Singh and his wife manage a restaurant a piece, there is no one available to manage the new, third restaurant, or to train an individual to do so. Because this alternative basis for responding to the deficiency was included in the NOF by virtue of the quoting of the regulation, we find that Employer had adequate notice of this possibility, and could have included the proffered evidence and argument in Rebuttal.

Moreover, we note that the evidence proffered by Employer under the business necessity argument directly contradicts its argument that Punjab #1 and Punjab #3 are separate entities. It is asserted that Mr. Ramjit Singh is merely a stockholder of two corporations, but the fact of family management indicates that the corporations are in fact closely held businesses. In such cases, the corporate veil is often pierced, the theory being that the corporations are merely the alter egos of the individual owner, in this case Mr. Ramjit Singh. Shearson Hayden Stone, Inc. v. Lumber Merchants, Inc., 500 F.Supp. 491 (S.D.Fla. 1980). Based upon the profferred evidence, the CO would be justified in finding that the separate corporations are merely alter egos for their owner, and that he is, therefore, the *de facto* employer at both business locations.

ORDER

Based upon the foregoing, the Final Determination of the Certifying Officer is hereby

affirmed, and the application for labor certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.